



U.S. Copyright Office

[Docket No. 2022–3]

Best Edition Study: Notice and Request for Public Comment

AGENCY: U.S. Copyright Office, Library of Congress.

ACTION: Notice of inquiry.

SUMMARY: The U.S. Copyright Office is undertaking a public study at the request of Senator Thom Tillis to evaluate the deposit requirements of section 407 and 408 of the Copyright Act and consider whether “removing the ‘best edition’ requirement from the registration deposit process in section 408 could help improve the registration process.” To aid in its review of this topic, the Office is soliciting input from interested members of the public.

DATES: Written comments must be received no later than 11:59 p.m. Eastern Time on [INSERT DATE 45 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: For reasons of government efficiency, the Copyright Office is using the *regulations.gov* system for the submission and posting of public comments in this proceeding. All comments are therefore to be submitted electronically through *regulations.gov*. Specific instructions for submitting comments are available on the Copyright Office website at <https://www.copyright.gov/policy/best-edition>. If electronic submission of comments is not feasible due to lack of access to a computer and/or the internet, please contact the Office using the contact information below for special instructions.

FOR FURTHER INFORMATION CONTACT: Megan Efthimiadis, Assistant to the General Counsel, by email at mefi@copyright.gov or telephone at (202) 707-8350.

SUPPLEMENTARY INFORMATION: On May 24, 2021, Senator Thom Tillis sent a letter seeking the Copyright Office’s “expertise and guidance regarding adjusted copyright examination and registration requirements.”¹ Specifically, Senator Tillis requested that the Office complete “a study regarding the feasibility of decoupling the deposit requirements of Section 407 of Title 17 from Section 408.”² The letter states that “[s]ome have asserted that” decoupling “could help improve the registration process by permitting low resolution digital deposits, for example.”³ In conducting the study, Senator Tillis asked the Office to consult with the Library of Congress to address the Library’s need to grow its collections, as well as to consider the Office’s own needs as part of the registration process.⁴

To guide its consideration of these issues, the Office is soliciting public comments on topics related to this inquiry. These comments will be used to inform the Office’s discussions with the Library and its consideration of the Office’s needs with respect to deposits for registration purposes.

I. Background

(A) Legal Background

The Copyright Act has two provisions requiring copyright owners to deposit copies of their works. First, under section 407 of the Act, once a copyrighted work is published in the United States, the copyright owner must, within three months of publication, deposit “two complete copies of the best edition” of the work with the

¹ Letter from Sen. Thom Tillis, Ranking Member, Subcomm. on Intell. Prop. of the S. Comm. on the Judiciary, to Shira Perlmuter, Reg. of Copyrights, U.S. Copyright Office 1 (May 24, 2021), <https://www.copyright.gov/policy/best-edition/5-24-21-Ltr-USCO-Copyright-Examination-and-Registration-Requirements-Studies-Final.pdf>.

² *Id.*

³ *Id.*

⁴ *Id.*

Copyright Office “for the use or disposition of the Library of Congress.”⁵ Second, under section 408, copyright owners who apply to register works that have been published must generally include with their applications a deposit that consists of “two complete copies or phonorecords of the best edition” of their works.⁶ The term “best edition,” as used in both section 407 and section 408 is defined as “the edition, published in the United States at any time before the date of deposit, that the Library of Congress determines to be most suitable for its purposes.”⁷

Copyright owners can deposit a single set of best edition materials that will satisfy their obligations under both sections 407 and 408. Section 408 explicitly provides that deposits made to satisfy section 407 may also be used to satisfy the registration deposit requirement, provided they are accompanied by a copyright application and fee.⁸ When applicants submit the required best edition copies with their registration applications, the Office provides the Library with copies of the materials that are within the Library’s selection criteria for addition to its collections.⁹

Together, the deposits received pursuant to sections 407 and 408 allow the Library of Congress to grow its collection as the nation’s library. The Copyright Office generally transfers over 700,000 copyright deposits to the Library each year.¹⁰

⁵ 17 U.S.C. 407(a), (b). *See generally* 37 CFR 202.19, 202.20.

⁶ 17 U.S.C. 408(b)(2).

⁷ *Id.* 101. *See also id.* 407(b).

⁸ *Id.* 408(b).

⁹ In many cases, the Copyright Office has issued regulations to require only one copy instead of two. *See, e.g.*, 37 CFR 202.19(d)(2)(vi) (permitting deposit of one complete copy of best edition for literary monographs), 202.20(c)(2)(i)(E) (permitting deposit of one complete copy of best edition of musical compositions published in copies).

¹⁰ *See* U.S. Copyright Office, Annual Report Fiscal 2019, at 48 (2019), <https://www.copyright.gov/reports/annual/2019/ar2019.pdf> (roughly 727,000 deposits transferred to Library); U.S. Copyright Office, Annual Report for Fiscal 2018, at 24 (2018), <https://www.copyright.gov/reports/annual/2018/ar2018.pdf> (almost 737,000 deposits transferred to Library). The number of deposits decreased in fiscal year 2020 due to a backlog of processing physical deposits as a result of the COVID-19 pandemic. U.S. Copyright Office, Annual Report Fiscal 2020, at 40 (2020), <https://www.copyright.gov/reports/annual/2020/ar2020.pdf> (roughly 550,000 deposits transferred).

(B) Best Edition Requirements

The Office’s regulations at appendix B to part 202 of title 37 of the Code of Federal Regulations—known as the Best Edition Statement—describe how to identify the best edition of a work. The regulations do not require a specific format; they instead describe an order of preference for formats of different types of works.¹¹ In most cases, physical copies of works must be submitted to meet the best edition requirement. For example, for printed textual matter, the Library of Congress prefers that the deposit be the largest possible size (other than a large-type edition for the partially-sighted), illustrated in color, and contain “archival-quality rather than less-permanent paper,” a hard cover, library binding, and a sewn rather than glued binding.¹² For photographs, the Library prefers the most widely distributed edition of the photograph, or an unmounted 8x10-inch glossy print on archival-quality paper.¹³

(C) Exceptions to Best Edition Requirements

The Office has the authority to waive the requirement that deposits be the best edition of a work, and it has done so in many circumstances. For section 407 deposits, the Office has promulgated regulations permitting deposit of versions that might not be the best edition as defined by the Best Edition Statement. For example, copyright owners of pictorial and graphic works published in small numbers have the option to deposit “photographs or other identifying material” of the works.¹⁴ For other types of works, such as greeting cards and three-dimensional sculptural works, the Office’s regulations waive

¹¹ See, e.g., 37 CFR 202, App. B.I.C.2 (for printed textual works with illustrations, the best edition is version with “[i]llustrations in color rather than black and white.”). The Best Edition Statement divides works into 10 categories: I. Printed Textual Matter, II. Photographs, III. Motion Pictures, IV. Other Graphic Matter, V. Phonorecords, VI. Musical Compositions, VII. Microforms, VIII. Machine-Readable Copies, IX. Electronic-Only Works Published in the United States and Available Only Online, and X. Works Existing in More Than One Medium. *Id.*

¹² See *id.* 202, App. B.I.

¹³ *Id.* 202, App. B.II.

¹⁴ See *id.* 202.19(d)(2)(iv).

the deposit requirement altogether.¹⁵ Additionally, for electronic-only books and serials published only in electronic form and available only online, deposit is required only on demand from the Copyright Office.¹⁶ The Office also may waive the best edition requirement for section 407 deposits for individual works upon request for “special relief,” typically when complying with the requirement would be burdensome or impractical.¹⁷ These requests may permit copyright owners to deposit a version of their work that does not fit the best edition requirement, such as an electronic copy of a work that was published as physical printed text. The Library and the Copyright Office have entered into continuing “special relief” agreements with a number publishers, whereby electronic copies of works in a publisher’s catalog are accepted as a substitute for the best edition under certain conditions.

The Office provides similar flexibility for section 408 registration deposits. For many works, such as computer programs, useful articles, and works exceeding 96 inches in any dimension, the Office permits applicants to deposit identifying material instead of the best edition.¹⁸ Identifying material is a deposit that provides at least “an adequate representation” of the content an applicant seeks to register.¹⁹ While the Office was closed to the public during the COVID-19 pandemic, the Office provided the option for applicants submitting electronic applications for works that required deposit of “best edition” physical copies to upload electronic copies of the works in addition to mailing the required physical copies, which enabled the Office to examine the works remotely.²⁰ As with section 407 deposits, the Office, in consultation with the Library, may also waive

¹⁵ *See id.* 202.19(c)(2), (6).

¹⁶ *See* 37 CFR 202.19(c)(5), 202.24.

¹⁷ *Id.* 202.19(e).

¹⁸ *See id.* 202.20(c)(vii), (xi)(A)(2), (xiii).

¹⁹ *Id.* 202.21(b).

²⁰ U.S. Copyright Office, Operations Updates During the COVID-19 Pandemic, <https://www.copyright.gov/coronavirus/>.

the best edition requirement on a case-by-case basis as “special relief,” upon request to permit the deposit of other formats that are more convenient for the applicant.²¹

(D) Criticism of Best Edition Requirements

While the best edition requirement satisfies important Library acquisition objectives, it can in some instances be an obstacle to registration and generally increases the Copyright Office’s registration processing times. Some copyright owners have explained that they have difficulty complying with the best edition requirement because they do not possess copies of the best edition of a work. Obtaining two copies—or even one—of the best edition of a work may sometimes be time-consuming and expensive. Shaftel & Schmelzer, a consulting firm that works with visual artists, has explained that “[v]isual creators sometimes have to purchase published copies at full retail price to submit with their registration application, adding significant cost to our registration”²² The statutory requirement that the best edition be one that has been published also creates a hurdle because creators may have difficulty determining if a particular version of a work has been published.²³

In response to a prior Copyright Office inquiry, the Association of American Publishers (“AAP”) commented that publishers of literary works sometimes find the

²¹ 37 CFR 202.20(d).

²² Shaftel & Schmelzer, Comments Submitted in Response to Notification of Inquiry on Registration Modernization, at 21 (Jan. 11, 2019). *See also* Coalition of Visual Artists, Comments Submitted in Response to Notification of Inquiry on Registration Modernization, at 25 (Jan. 15, 2019) (“Tracking down hard copies of the first published use of a particular image is often difficult or impossible. And purchasing two copies of a book, for example, unnecessarily increases registration expense.”).

²³ On December 4, 2019, the Office published a notification of inquiry in which it noted the uncertainty expressed by some registration applicants as to how the term “publication” applies in the online context, and sought perspectives and suggestions regarding possible new regulations interpreting the statutory definition of publication and policy guidance regarding the role that publication should play in copyright law and the registration process. 84 FR 66328 (Dec. 4, 2019). The Office recently described the actions it has taken to provide additional guidance regarding the definition of “publication,” and discussed how it will supplement those efforts going forward. Letter from Shira Perlmutter, Reg. of Copyrights, U.S. Copyright Office, to Sen. Thom Tillis, Ranking Member, Subcomm. on Intell. Prop. of the S. Comm. on the Judiciary (Dec. 1, 2021).

Office’s registration deposit requirements to be “costly, risky, and illogical,” and indicated they would welcome the ability to submit electronic deposits for registration if they could do so in a manner that was secure, with the deposit “kept wholly separate from the collections of the Library and its access or interlibrary lending or surplus books policies.”²⁴ In particular, AAP explained that the current best edition requirements do not accept ePub files, which are its members’ preferred format.²⁵ Likewise, the Copyright Alliance urged the Office to create options for applicants to upload digital deposits in a manner that takes into account applicants’ operational systems and work processes.²⁶ Visual artists also have maintained that the ability to submit digital deposits of their works encourages registration.²⁷

As the Office has explained to Congress, the section 408 best edition requirement often increases registration processing times for a number of reasons.²⁸ After electronic applications and fees have been submitted, authors or publishers must incur the time and expense of packaging and shipping physical copies of works, along with shipping slips that connect the physical works with the electronic applications. Once the physical copies

²⁴ Association of American Publishers, Comments Submitted in Response to Notification of Inquiry on Registration Modernization, at 2 (Jan. 15, 2019).

²⁵ *Id.* at 2 n.2.

²⁶ Copyright Alliance, Comments Submitted in Response to Notification of Inquiry on Registration Modernization, at 25–26 (Jan. 15, 2019).

²⁷ *See, e.g.*, Coalition of Visual Artists, Comments Submitted in Response to Notification of Inquiry on Registration Modernization, at 25–26 (Jan. 15, 2019) (describing the “two best-edition” requirement as “archaic, unnecessary and impractical”); Graphic Artists Guild, Comments Submitted in Response to Notification of Inquiry on Registration Modernization, at 8–9 (Jan. 15, 2019) (requesting that applicants be permitted to submit digital deposits for all types of works and only be required to provide a physical deposit if the Library determines that it wants to include the work in its collection).

²⁸ Letter from Karyn A. Temple, Reg. of Copyrights, U.S. Copyright Office, to Sen. Thom Tillis, Chairman, Subcomm. on Intell. Prop. of the S. Comm. on the Judiciary, and Sen. Christopher A. Coons, Ranking Member, Subcomm. on Intell. Prop. of the S. Comm. on the Judiciary 18 (May 31, 2019), <https://www.copyright.gov/laws/hearings/response-to-march-14-2019-senate-letter.pdf> (“Senate Letter”); Letter from Karyn A. Temple, Reg. of Copyrights, U.S. Copyright Office, to Rep. Jerrold Nadler, Chairman, H. Comm. on the Judiciary, and Rep. Doug Collins, Ranking Member, H. Comm. on the Judiciary 18 (May 31, 2019), <https://www.copyright.gov/laws/hearings/response-to-april-3-2019-house-letter.pdf> (“House Letter”).

arrive at the Office, they must undergo off-site security screening and decontamination, be matched to a corresponding electronic application, have security measures applied, and be physically brought to an examiner's workspace before examination can begin. The time delay adversely affects applicants because the effective date of registration is not assigned until the Office has received the deposit in addition to the application and fee.²⁹ Second, under the current rules, in addition to examining whether a work is copyrightable, an examiner must review each deposit for compliance with the best edition rules to confirm whether the proper version has been received. Correspondence with applicants is often necessary to ensure that they have complied with the Library's best edition criteria and the Copyright Office's regulations.³⁰ This adds additional complexities and time to the examination process.

As a result, applications with physical deposits take much longer for the Office to process than those with electronic deposits.³¹ On average, examination of electronic applications that do not need correspondence takes 1.1 months for those with electronic deposits and takes 10.8 months for those with physical deposits. The average processing time for electronic applications that do need correspondence is 3.4 months for those with electronic deposits and 13.1 months for those with physical deposits.³²

(E) Digital Deposit Options

The Office has been exploring options that would permit registration applicants to submit digital copies of works and provide the Library with physical copies only upon demand. Since 2018, the Office has required applicants seeking to register a group of newspapers to file an online application rather than a paper application and to upload a

²⁹ 17 U.S.C. 410(d); U.S. Copyright Office, *Compendium of U.S. Copyright Office Practices* sec. 625 (3d ed. 2021).

³⁰ Senate Letter at 18; House Letter at 18.

³¹ Senate Letter at 19; House Letter at 19.

³² U.S. Copyright Office, *Registration Processing Times*, <https://www.copyright.gov/registration/docs/processing-times-faqs.pdf>.

complete electronic copy of each issue through the electronic registration system instead of submitting them in physical form.³³ The Library has incorporated electronic copies of these registration deposits into its collections, and provides its patrons with secure onsite access to them, subject to a number of security restrictions.³⁴ If this model were applied to other categories and classes of registered works, the Office could both meet the Library's collections needs and expand the ability of applicants to provide electronic deposits in lieu of physical best edition copies, while providing secure, rights-restricted access to the works.

The Library's Office of Chief Information Officer ("OCIO") is currently working with the Office to build a new Enterprise Copyright System ("ECS") to improve the Office's provision of copyright services to the public, including its registration services. This will include replacing the Office's current electronic system for registration. As part of the Office's prior rulemaking on registration modernization, the Office inquired about providing greater flexibility for copyright applicants to deposit digital versions of their works, with physical copies only deposited upon request. The responses to that inquiry were generally very positive.³⁵

The Library has been focusing on its digital collecting capacity and capability for over two decades and has expressed a commitment to continuing to strengthen its digital collections. The Library has stressed that new electronic deposit options for copyright owners must take into account "the Library's collection needs, technological capabilities, and security and access issues."³⁶ The Library's Library Collections and Services Group

³³ 37 CFR 202.4(e).

³⁴ *Id.* 202.18.

³⁵ *See* 85 FR 12704, 12711–12 (Mar. 3, 2020) (summarizing public comments on issue of digital deposits).

³⁶ *Id.* *See also* Carla Hayden, Libr. of Congr., Responses to Questions for the Record, Subcomm. on Intell. Prop. of the S. Comm. on the Judiciary at 17 (Jan. 7, 2020), <https://www.judiciary.senate.gov/imo/media/doc/Hayden%20Responses%20to%20QFRs.pdf> (noting that digital deposits options must "appropriately balance security with ease of use").

(part of which was formerly known as Library Services) has expressed support for permitting digital deposits for all copyright applications in the long run. Noting that the Library depends on the items acquired via copyright deposit to help build its collection, it further explained that “[w]hile the submission of e-copies as opposed to print copies for purposes of registration would pose some difficulties in terms of service to Congress and other user groups, having access to e-copies of the content will be beneficial in the long term.”³⁷

The Library’s Digital Collections Strategy: Fiscal Years 2022-2026 focuses on “further mainstreaming and routinizing digital collecting and digital collections management across the wide range of areas, formats, and subjects the Library of Congress collects.”³⁸ Pursuant to this Strategy, the Library has committed to continuing to work closely with the Office to explore possible regulatory updates to the deposit requirements, including “planning electronic deposit workflows related to the acquisition of electronic deposits for mandatory deposit and registration deposit” for works that could include “books, serials, motion pictures, sound recordings, music compositions, maps, photographs, prints, drawings, design and architectural materials, technical designs, technical reports, and web content.”³⁹ The Strategy also notes that the Library plans to transition to “e-preferred,” in which digital formats are preferred over traditional physical formats, across its major acquisitions streams, including deposits from the Copyright Office.⁴⁰

II. Subjects of Inquiry

To guide the Office’s consideration of these issues and its consultation with the

³⁷ Library of Congress Library Services, Comments Submitted in Response to Notification of Inquiry on Registration Modernization, at 1–2 (Jan. 15, 2019).

³⁸ Library of Congress, Digital Collections Strategy Fiscal Years 2022–2026, at 3 (2021), https://www.loc.gov/acq/devpol/Digital%20Collections%20Strategy%20Overview_final.pdf.

³⁹ *Id.* at 4.

⁴⁰ *Id.* at 4–5.

Library, the Office invites written comments on the subjects below. A party choosing to respond to this notice of inquiry need not address every subject, but the Office requests that responding parties clearly identify and separately address each subject for which a response is submitted. The Office also requests that commenters explain their interest in the study and, with respect to each answer, the basis for their knowledge. Citations to published data and other external documents that support commenters' viewpoints are particularly helpful to the Office's review of written comments.

1. One way to address concerns raised regarding the best edition requirement would be to limit the categories of deposits to it applies. To what categor(y/ies) of deposits do you think the best edition requirement should apply and why? What would be the impact on Library collections? What would be the impact on claimants' ability to register their copyrights?
2. If registration and mandatory deposit requirements were no longer linked, how would this affect the deposit burden on copyright owners? How would it affect the Library's collections? How would it affect claimants' ability to register their copyrights?
3. Should the Office expand the options for submitting electronic deposits for the purpose of examining registration applications and selection by the Library for its collections while retaining the requirement to submit best edition copies upon demand by the Library pursuant to section 407? Why or why not?
4. Would copyright owners prefer to deposit electronic deposit copies for registration purposes instead of copies that meet the best edition standards? Why or why not? Would copyright owners like the option to provide electronic copies or best edition physical copies? Why or why not? How would the submission of electronic copies for registration affect the Library's collections and operations? What effect would the use of electronic copies

- have on the public record, and on a researcher's ability to use the work?
5. Would the option to deposit electronic deposit copies create security concerns that the Copyright Office's and the Library's protocols do not currently address? What are the security concerns most important to applicants if electronic deposit copies are permitted and how could the Library address them?
 6. The Copyright Act requires that a "best edition" of a work must be the edition published in the U.S. Can this definition be interpreted to include digital file formats that were not themselves distributed to the public but contain the same copyrightable material as the edition distributed to the public?
 7. Please identify any pertinent issues regarding digital deposit and the best edition requirement not referenced above that the Office should consider in conducting its study.

Dated: May 31, 2022.

Suzanne V. Wilson,
General Counsel and Associate Register of Copyrights.
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